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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

KATHLEEN R. DOUGLAS, as Trustee, etc. et al., Plaintiffs and Appellants, v. WHITNEY EDWARDS, Defendant and Respondent.	D072108 (Super. Ct. No. 37-2011-00066704-CU-OR-CTL)

APPEAL from an order of the Superior Court of San Diego County, Joel R. Wohlfeil, Judge. Appeal dismissed.

Andrew Rauch, Andrew K. Rauch and Omid J. Afati for Plaintiffs and Appellants.

Kessler & Seecof, Daniel J. Kessler and Benjamin R. Seecof for Defendant and Respondent.

I.

INTRODUCTION

"[N]ot every postjudgment order that follows a final appealable judgment is appealable." (*Lakin v. Watkins Associated Industries* (1993) 6 Cal.4th 644, 651 (*Lakin*).)

Among other requirements, California law is clear that to constitute an appealable postjudgment order, the order at issue must *not* be prefatory to a later judgment. (See, e.g., *Lakin*, *supra*, 6 Cal.4th at p. 652 [reviewing Supreme Court case law "determin[ing] the appealability of a variety of postjudgment orders," and stating that orders that were determined not to be appealable include those "although following an earlier judgment, are more accurately understood as being preliminary to a later judgment, at which time they will become ripe for appeal"]; *Macaluso v. Superior Court* (2013) 219 Cal.App.4th 1042, 1050 (*Macaluso*), quoting *Lakin*; *Consumer Advocacy Group, Inc. v. Kintetsu Enterprises of America* (2007) 150 Cal.App.4th 953, 980 ["postjudgment order is appealable where issue in order is different from issue in judgment and is not preliminary to a later judgment," citing *Lakin*]; see generally Eisenberg et al., Cal. Practice Guide: Civil Appeals and Writs (The Rutter Group 2018) ¶ 2:153.2, pp. 2-94 to 2-95 [stating that in order to constitute an appealable postjudgment order, "the postjudgment order must *not be preliminary to a later proceeding*"].)

Appellants Kathleen Douglas, Lisa Douglas, and Scott Douglas (collectively the Douglases) filed an appeal from a February 22, 2017 postjudgment order entered after an April 2013 interlocutory judgment in the first phase of a bifurcated trial. The February 22 order specifies how the trial court intends to "instruct the jury" on several issues in the second phase of the bifurcated trial and memorializes the court's rulings on a series of in limine motions, in anticipation of the trial. Because it is clear that the February 22 order is "preliminary to a later judgment" to be entered upon the completion of the jury trial (*Lakin*, *supra*, 6 Cal.4th at p. 652), and the claims that the Douglases seek to raise in this

appeal will "become ripe for appeal," only upon entry of that subsequent judgment (*ibid.*), the February 22 order is not an appealable postjudgment order. Accordingly, we dismiss the Douglases' appeal.[1]

II.

FACTUAL AND PROCEDURAL BACKGROUND[2]

A. *The initial procedural history of the case*

In 2011, the Douglases filed this action against respondent Whitney Edwards. Edwards filed a cross-complaint against the Douglases. The parties' claims arise from a dispute over real property that they purchased together.

The trial court granted Edwards's motion to bifurcate the trial of the parties' legal and equitable claims. The trial court held a trial on the equitable claims and, in April 2013, entered an interlocutory judgment directing partition of the property.

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1 On appeal, the Douglases assert three other possible grounds for appellate jurisdiction. As we explain in part III.B, *post*, none of these arguments has any merit whatsoever. For reasons explained in part III.C, *post*, we also deny the Douglases' request to treat their appeal as a petition for extraordinary writ relief.

2 We grant Edwards's unopposed July 13, 2018 request that we take judicial notice of our opinion in a prior appeal in this matter (*Douglas v. Edwards* (Apr. 23, 2015, D064389) [nonpub. opn.]) and the record from that appeal. (See Evid. Code, §§ 459 ["The reviewing court may take judicial notice of any matter specified in [Evidence Code]Section 452"], 452, subd. (d) [permitting a court to take judicial notice of the "records of (1) any court of this state"].) Our factual and procedural background is based in part on undisputed facts drawn from the record in *Douglas v. Edwards*, *supra*, D064389.

Both parties appealed from the interlocutory judgment. In an April 2015 opinion, we affirmed the interlocutory judgment of partition in all respects, *Douglas v. Edwards*, *supra*, D064389, slip opinion at page 3.

B. *Proceedings in the trial court after the issuance of the remittitur in* Douglas v. Edwards, supra, *D064389*

1. *The parties' October 2016 motions in limine*

In October 2016, both parties filed a series of lengthy motions in limine, oppositions thereto, and supporting documentation, in the trial court in anticipation of the second phase of the trial.

2. *The October 31, 2016 hearing on the motions in limine*

On October 31, 2016, the trial court held a hearing on the parties' motions. At the outset of the hearing, the court explained the purpose of the hearing:

> "So if I recall correctly, what we were going to do is work our way through the motions in limine so that each side has, if you will, a lay of the land going forward into the trial of the next, and hopefully, last phase.
>
> "And, in conclusion, with the Court finalizing its rulings, we will figure out when we're starting trial.
>
> "Is that what you all thought we were going to do today?"

Counsel for both parties responded in the affirmative.

3. *The Douglases' February 21, 2017 request for a final order on the motions in limine*

On February 21, 2017, the Douglases filed a request that the court enter a final order on the motions in limine. The Douglases' explained that they were making the request in order to "simplify the issues for trial."

4. *The February 22, 2017 order*

The following day, February 22, 2017, the court held a hearing on the Douglases' request that the court enter a final order indicating its rulings on the parties' motions in limine. That same day, the trial court entered an order entitled, "Order on motions *in limine*." In the order, after outlining the procedural posture of the case, the trial court noted that it had previously indicated that the " 'scope of the evidence at the [second] phase . . . [would] be consistent with the Court's findings and orders through this [first] phase.' "[3]

After these preliminary remarks, the trial court's order indicates the manner by which the court intended to instruct the jury with respect to various issues. The February 22 order states in relevant part:

> "The Court intends to instruct the jury of the following findings:
>
> "1. [The Douglases] and [Edwards] entered into a joint venture involving the property . . . .
>
> "[Finding number 2 is stricken out.]
>
> "3. In 2006, [the Douglases] and [Edwards] refinanced the property. The total amount of the refinancing was $417,000. The sum of $277,583.72 of the refinancing was transferred to [the Douglases'] personal account. [Edwards] received none of the $277,583.72.
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> "4. The Court conducted an accounting of [the Douglases'] and [Edwards's] capital accounts. After receiving testimony from [Edwards's] expert . . . and [Douglases'] expert . . . , the Court determined that [the Douglases] are obliged to remit to [Edwards] the amount of $112,472 to equalize their capital accounts.

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3 In so stating, the trial court quoted from our prior opinion in the matter.

> "5. Since April 2009, [the Douglases] have solely occupied the property, and in 2016, pursuant to an agreement entered into between the parties under the supervision of [a judicial referee], [the Douglases] assumed the existing mortgage and purchased the property."

The order also memorializes the court's rulings on the parties' motions in limine. Some of the rulings, but not all, have the words "w/o prejudice" together with the trial judge's initials, written next to them. Two of the rulings that do not specifically have the words "w/o prejudice" written next to them are the court's rulings on the Douglases' motions in limine numbers 11 and 20. The rulings state:

> "11. [The Douglases'] motion *in limine* no. 11 of 20 to confirm that the joint venture was wound up, dissolved and all assets distributed is GRANTED as follows: the jury will be instructed that plaintiffs are obligated to remit to defendant the amount of $112,472.80 to equalize their capital accounts."
>
> "[¶] . . . [¶]
>
> "20. [The Douglases'] motion *in limine* no. 20 of 20 to confirm the Court's finding from phase 1 regarding contributions of the parties is GRANTED as limited by the Court's findings, *supra*."

C. *Proceedings in this court on appeal*

1. *The Douglases' notice of appeal*

In April 2017, the Douglases filed a notice of appeal from the February 22 order.

2. *The Douglases' opening brief in this court*

In the "Statement of Appealability" (boldface omitted) in the Douglases' opening brief in this court, the Douglases state, "the February 22, 2017 order appears to be an interlocutory judgment in an action for partition determining the rights and interests of the respective parties. (Code of Civ. Proc.[,] §[904.1, subd.](a)(9).) This order is also

apparently an order directing payment of monetary sanctions. (Code of Civ. Proc.[,] §[904.1, subd.](a)(11).)"

The Douglases raise numerous claims in their opening brief pertaining to the trial court's "accounting" in the matter, which appear to be related to the trial court's rulings that "the jury will be instructed that [the Douglases] are obligated to remit to [Edwards] the amount of $112,472.80 to equalize their capital accounts," and the trial court's rulings on various motions in limine related to this issue.

3. *Edwards's motion to dismiss*

Edwards filed a motion to dismiss the appeal in this court. In her motion to dismiss, Edwards contended that the Douglases were appealing from a nonappealable order, among other arguments.

4. *The Douglases' opposition to the motion to dismiss*

The Douglases filed an opposition to the motion to dismiss in which they argued that the February 22 order was an appealable postjudgment order under Code of Civil Procedure section 904.1, subdivision (a)(2).[4] The Douglases also maintained that the February 22 order was appealable pursuant to the collateral order doctrine, since the order purportedly directed the Douglases to pay a sum of money. In the alternative, the Douglases requested that this court treat their appeal as a writ petition to the extent we conclude that they appealed from a nonappealable order.

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4 Unless otherwise specified, all subsequent statutory references are to the Code of Civil Procedure.

As discussed in part II, *post*, section 904.1, subdivision (a)(2) states in relevant part that an appeal may be taken from "an order made after a judgment . . . ."

5. *This court's ruling on Edwards's motion to dismiss*

Prior to Edwards's filing of her respondent's brief, this court summarily denied her motion to dismiss. However, our order stated, "[T]he parties may further address the issue of appealability in their respective briefs."

6. *Edwards's respondent's brief*

In her respondent's brief, Edwards argues that "[t]he trial court's motion in limine rulings are not appealable." (Boldface and underlining omitted.) Among other contentions, Edwards contends that the Douglases are "appealing from interlocutory rulings," and notes that "[t]he second phase of trial has not yet even begun." Edwards argues in relevant part:

> "Apart from clogging this Court with multiple appeals in the same case,[fn. omitted] the Douglases' current appeal of the trial court's rulings on their motions *in limine*: (1) produces uncertainty and further delay in the trial court of the second phase of trial; (2) is premature because the Douglases' complaints may be remedied by a final judgment; and (3) results in an incomplete record for this Court to review concerning the basis for the Douglases' current legal claims against Edwards, concerning whether the trial court's rulings actually harmed the Douglases in those claims, and concerning how this Court should direct the trial court to remedy such errors (if any).
>
> "In short, the Douglases should not be permitted to run to this Court every time they are dissatisfied with an interim ruling from the trial court. They should not be allowed to complain in this Court about the trial court's math each time they believe the trial court got it wrong. Any such complaints should have to wait for the end of the

> case when the judgment is final and when this Court will have a complete record to review of this matter in its entirety."[5]

Edwards does not specifically address the Douglases' contention that the February 22 order is an appealable postjudgment order under section 904.1, subdivision (a)(2).

7. *The Douglases' reply brief*

In their reply brief, the Douglases reiterate their argument that the February 22, 2017 order is an appealable postjudgment order pursuant to section 904.1, subdivision (a)(2). The Douglases also explain that their appeal pertains to the trial court's preliminary findings articulated in the February 22 order as well as to the court's rulings with respect to various motions in limine that were made with prejudice, "including [the trial court's rulings on the Douglases'] motions [in limine]11 and 20."

III.

DISCUSSION

A. *The February 22, 2017 order is not an appealable postjudgment order*

The Douglases contend that the February 22, 2017 order is an appealable postjudgment order pursuant to section 904.1, subdivision (a)(2).[6] We disagree.

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5 In the omitted footnote, Edwards argues, "And, given the Douglases' history in this case, they will most certainly return to this Court if they are dissatisfied with the actual final judgment after the second phase of trial."

6 As noted in part II, *ante*, while Edwards claims that the Douglases are appealing from a nonappealable order, Edwards did not specifically address the Douglases' argument that the February 22 order is an appealable postjudgment order under section 904.1, subdivision (a)(2) nor did she discuss *Lakin* and its progeny in either her motion to dismiss or in her respondent's brief. Notwithstanding Edward's failure to specifically address this theory of appealability, we consider that theory here since we must determine

1. *Governing law*

Section 904.1 provides in relevant part:

> "(a) An appeal, other than in a limited civil case, is to the court of appeal. An appeal, other than in a limited civil case, may be taken from any of the following:
>
> > "(1) From a judgment, except an interlocutory judgment, other than as provided in paragraph[ ] (9) . . . .
> >
> > "(2) From an order made after a judgment made appealable by paragraph (1).
> >
> > "[¶] . . . [¶]
> >
> > "(9) From an interlocutory judgment in an action for partition determining the rights and interests of the respective parties and directing partition to be made."

The law is clear that not *all* postjudgment orders are appealable under section 904.1, subdivision (a)(2). (*Lakin, supra,* 6 Cal.4th at p. 651.) "To be appealable, a postjudgment order must satisfy two additional requirements." (*Ibid.*)[7] "The first requirement . . . is that the issues raised by the appeal from the order must be different from those arising from an appeal from the judgment." (*Ibid.*)[8] "The second requirement

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whether we have jurisdiction to consider the Douglases' appeal. (See *Harrington-Wisely v. State of California* (2007) 156 Cal.App.4th 1488, 1494 ["The existence of an appealable judgment or order is a jurisdictional prerequisite to an appeal"].)

[7] In a footnote, the *Lakin* court noted, "The prerequisite that the underlying judgment must itself be final is sometimes described as a third requirement of appealable postjudgment orders." (*Lakin, supra*, 6 Cal.4th at p. 651, fn. 3.) This prerequisite is not in dispute in this case. (See *ibid.*)

[8] Edwards argues that this appeal raises many of the same issues as were decided in the prior appeal and that the Douglases may not appeal those issues again. We need not

. . . is that 'the order must either affect the judgment or relate to it by enforcing it or staying its execution.' " (*Id.* at pp. 651–652.) With respect to the second requirement, the *Lakin* court reviewed case law and explained that a postjudgment order that is preliminary to a later judgment does *not* satisfy this second requirement, and is therefore *not* appealable:

> "In the ensuing years we determined the appealability of a variety of postjudgment orders. It is instructive to review those we have held did not affect the judgment or relate to its enforcement, and hence were not appealable. All are orders that, although following an earlier judgment, are more accurately understood as being preliminary to a later judgment, at which time they will become ripe for appeal." (*Id.* at p. 652.)[9]

In light of *Lakin*, numerous courts, including this court, have repeatedly held that a postjudgment order is *not* appealable under section 904.1, subdivision (a)(2) if the order is "preliminary to some future judgment from which the order might be appealed." *Day v. Collingwood* (2006) 144 Cal.App.4th 1116, 1123; see, e.g., *Finance Holding Company, LLC v. American Institute of Certified Tax Coaches, Inc.* (2018) 29 Cal.App.5th 663, 679 ["the key test for finality of a third party discovery order in

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consider this argument in light of our conclusion that the order is not appealable because the second requirement is not satisfied.

9 The *Lakin* court noted that the Supreme Court had previously explained that the reason for making postjudgment orders appealable is that without such a provision, there would be no "reliable remedy against . . . an order only entered subsequent[ ]" to a judgment. (*Lakin, supra,* 6 Cal.4th at p. 651, italics omitted, quoting *Calderwood v. Peyser* (1871) 42 Cal. 110, 116.) However, there is no such need for interlocutory review of a postjudgment order that is preliminary to another appealable judgment, since the postjudgment order will be reviewable on appeal from the second judgment. (See *Lakin, supra,* at p. 652 [stating that postjudgment orders that are "preliminary to a later judgment," will become "ripe for appeal," upon entry of the later judgment].)

enforcement proceedings is whether the challenged order reflects a final determination of the rights or obligations of the parties or whether it contains language showing it is preparatory to a later ruling that will be embodied in an appealable judgment or order" (italics omitted)]; *Macaluso*, *supra*, 219 Cal.App.4th at p. 1050.)

2. *Application*

The February 22, 2017 order is a postjudgment order since it was entered after the April 2013 interlocutory judgment of partition. However, the February 22 order neither enforces the prior interlocutory judgment nor stays its execution, as is required in order to be appealable under section 904.1, subdivision (a)(2). (See *Lakin*, *supra*, 6 Cal.4th at pp. 651–652).

Rather, the February 22 order indicates the manner by which the trial court intended to instruct the jury on several issues during the second phase of the bifurcated trial and memorialized a series of pretrial in limine rulings for the purpose of clarifying the manner by which the trial would be conducted.[10] As such, the order was clearly "preliminary to a later judgment" to be entered after the jury trial; the claims that the

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10 In their February 21, 2017 request that the court enter a final order on the motions in limine, the Douglases stated, "Plaintiffs request that the Court issue its Order to *clarify the issues for trial*." (Italics added.) The Douglases added:

> "The urgency for this application relates to the attempt to avoid substantial expenses in trial preparation. The Plaintiffs have or will expend substantial sums in preparing for trial and arranging for witnesses and working to set the sequence of evidence. To allow for certainty and avoid substantial expenses, the Plaintiffs respectfully request the relief sought above. *The request is sought to simplify the issues for trial*." (Italics added.)

In response to the Douglases request, the court entered the February 22 order from which the Douglases' appeal.

Douglases seek to raise in this appeal will "become ripe for appeal," only upon entry of that subsequent judgment. (*Lakin, supra*, 6 Cal.4th at p. 652.)

The Douglases' arguments to the contrary are not persuasive. In their opposition to Edwards' motion to dismiss, the Douglases note that the February 22 order states that " 'Plaintiffs are obligated to remit to Defendant the amount of $112, 472.80.' " After quoting this language, the Douglases argue that the February 22 order is "an erroneous order of distribution following the sale by partition."[11] This argument is unpersuasive because it is premised on a selective quotation of the court's order and omits important context. The court's order states in relevant part, "The Court *intends to instruct the jury* of the following findings: [¶] . . . [¶] the Court determined that Plaintiffs are obligated to remit to Defendant the amount of $112,472 to equalize their capital accounts."[12] (Italics added.) Thus, it is clear that the February 22 order is not an order of distribution, but rather, that it is an order outlining the manner by which the trial court intends to instruct the jury during the second phase of the trial.

The Douglases also emphasize repeatedly that the trial court's rulings that they seek to challenge on appeal were made *with* prejudice. Even assuming for the sake of

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11 The Douglases repeat this quotation in their reply brief, and incorporate this argument from their opposition to the motion to dismiss in their reply brief.

12 In our prior opinion, we noted that the trial court received evidence in the first phase of the trial that "[t]he difference between the Douglases' and Edwards's capital accounts was $112,472.80." (*Douglas v. Edwards*, *supra*, D064389.)

argument that this is so,[13] we are aware of no authority, and the Douglases cite none, that supports the proposition that a postjudgment order is appealable merely because it is made with prejudice. To permit an appeal every time a postjudgment order is entered with prejudice would be entirely inconsistent with the rule that postjudgment orders that are preliminary to a subsequent judgment are *not* appealable.

The Douglases also contend that the order is an appealable postjudgment order under *Solis v. Vallar* (1999) 76 Cal.App.4th 710 (*Solis*). *Solis* is distinguishable. The order at issue in that case constituted an order "confirming a partition sale," (*id.* at p. 713) and thus affected a prior interlocutory judgment directing the partition and sale by enforcing the prior judgment. (*Ibid.*) The order in this case does not confirm the partition of, or enforce, the prior interlocutory judgment. Further, the order in *Solis* was *not* preliminary to a jury trial (*id.* at p. 712 [describing procedural background]), as is true of the February 22 order in this case. Thus, the *Solis* court had no occasion to, and did not discuss, the requirement that the postjudgment order not be preliminary to a later judgment.

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13 In the October 31, 2016, hearing on the motions in limine, the trial court stated:

> "[E]very motion in limine is without prejudice for you to ask me to take another look at it at or before trial or during trial. Particularly during trial, as evidence emerges, I can't begin to tell you how often, Counsel, I begin to see a picture emerge that allows me to more intelligently evaluate evidentiary objections or the scope of in limine rulings I made. From my perspective, it's not changing my mind; it's simply evolving as the evidence is being presented. So absolutely, Counsel, without prejudice."

Accordingly, we conclude that the February 22 order is not an appealable postjudgment order.

B. *None of the Douglases' other arguments in support of appellate jurisdiction has any merit*

The Douglases assert in their opening brief that the February 22 order "appears to be an interlocutory judgment in an action for partition." (See § 904.1, subd. (a)(9) [making appealable an "interlocutory judgment in an action for partition determining the rights and interests of the respective parties and directing partition to be made"]. We disagree. The February 22 order is not a judgment, and it does not direct a partition of real estate.

The Douglases assert that the February 22 order "is also apparently an order directing the payment of monetary sanctions." This assertion is also entirely without merit, since the February 22 order has nothing whatsoever to do with sanctions.

Finally, in opposing respondent's motion to dismiss, the Douglases argued that the February 22 order is appealable under the collateral order doctrine. This argument also is entirely without merit since the order does not command the Douglases to pay a sum of money, as is required for the doctrine to apply. (See *Sjoberg v. Hastorf* (1948) 33 Cal.2d 116, 119.)

C. *We deny the Douglases' request that we treat their appeal as a writ petition and consider the merits of their claims*

In their opposition to the respondent's motion to dismiss, the Douglases requested that, to the extent we conclude that the February 22 order is a nonappealable order, we

treat their appeal as a writ petition and consider the merits of their claims. They argue in part, "[T]he Trial Court is intending to instruct the jury at the outset of the case . . . for legally erroneous reasons."

"[A]ppellate courts have the discretion to treat an appeal from a nonappealable order as a petition for writ relief, and thus determine the merits of the challenge to the order, but only under limited, extraordinary, circumstances." (*MinCal Consumer Law Group v. Carlsbad Police Dept.* (2013) 214 Cal.App.4th 259, 265.) Where a petitioner has an adequate remedy at law by way of an appeal, writ relief will ordinarily be denied. (See *Roden v. AmerisourceBergen Corp.* (2005) 130 Cal.App.4th 211, 214 ["We dismiss the appeal as taken from a nonappealable order and deny the petition for a writ of mandate because Bergen has an adequate remedy at law"].)

In this case, the Douglases present no extraordinary or compelling reason to provide them with appellate review of their claims at this stage of the proceedings. Specifically, they have not demonstrated that they lack an adequate remedy at law by way of an appeal upon the completion of the proceedings in the trial court. After the conclusion of the jury trial, and entry of a final judgment, the Douglases will have an opportunity to file an appeal and raise whatever claims they have properly preserved in the trial court.

IV.

DISPOSITION

The appeal is dismissed. Edwards shall recover costs on appeal.

AARON, J.

WE CONCUR:

McCONNELL, P. J.

O'ROURKE, J.